CHAPTER V.

OBSTRUCTIONS AND NUISANCES.

NUISANCE may be defined, with reference to highways, as any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway (*a*). The nuisances of most frequent occurrence are erections and excavations upon or adjoining the highway, and unreasonable and excessive user of the highway.

Erections and excavations upon the highway are unlawful because not justified by the easement and interfering with the public right. Erections and excavations adjoining the highway are not unlawful if the occupier of the land on which they are made takes adequate measures, *e.g.*, by fencing, for the safety of passengers; and if the highway has been dedicated subject to their existence, the occupier does not incur any liability to fence. Persons who are entitled to use the highway for purposes of passage may become wrongdoers by abusing their right to the inconvenience or hindrance either of other passengers or of adjoining owners. A few other nuisances on or near the highway, which are not comprised in these classes, require to be noticed separately.

Wrongful Erections or Excavations. — A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law. This principle applies to every part of the way which is subject to the public right of passage; and where an ordinary highway runs between fences,

(*a*) *Cf.* BYLES, J. : "A nuisance to a way is that which prevents the convenient use of the way by passengers" (*R.* v. *Mathias* (1861), 2 F. & F. 570). In Bacon's Abridgment (Nuisances), nuisance is defined generally as follows: "A public or common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the Queen's subjects, or by neglecting to do a thing which the common good requires." In the Criminal Code (Indictable Offences) Bill, 1879 (as amended in Committee), s. 150, the term was thus defined: "A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her Majesty's subjects." Pollock on Torts, 9th ed., p. 413. All these definitions, of course, include non-repair, which has been dealt with in the previous chapter.

one on each side, the right of passage over it extends primâ facie over the whole space between the fences (*b*).

It is no defence that the obstruction is made on a part of the highway which is not habitually or ordinarily used for passage, nor that sufficient space is left for the public traffic (*c*). Nor is it a defence that the highway in question has become a *cul-de-sac* which is no longer of utility to the public; for the public right still exists and the obstruction is an injury to that right; but this circumstance may be taken into consideration in estimating the punishment to be inflicted (*d*). The duty does not extend to a road not yet dedicated. So where the defendant while erecting houses on land adjoining a new road had dug a trench across the road for the purpose of making a drain and the plaintiff drove along the road in the dark into the trench and suffered damage, it was held that the defendant was guilty of no negligence, there being no duty cast upon him to protect any one using the road without licence (*e*).

It is no defence that the obstruction, though a nuisance, is in other ways productive of public benefit (*f*).

Whether an obstruction is a nuisance or not is a question of fact, and a jury may find that an obstruction is so slight, inappreciable, or insignificant as not to constitute a nuisance (*g*). No indictment will lie for a mere "mathematical obstruction such as would be made by a child's building" (*h*). Where, on an indictment for obstructing a harbour and rendering it less secure by erecting and continuing piles and planking in it, the jury found that by the defendant's works the harbour was in some extreme cases rendered less secure, the court held that this amounted to a verdict of not guilty, the consequences being very slight, uncertain, and rare (*i*). Where on an indictment for encroaching on a highway by means of a chapel, the jury found that a portion of the site of the chapel was part of the highway, but that the

(*b*) *R.* v. *United Kingdom Electric Telegraph Co., Limited* (1862), 31 L. J. M. C. 166.

(*c*) *Ibid.*

(*d*) *R.* v. *Burney* (1875), 31 L. T. (N.S.) 828.

(*e*) *Murley* v. *Grove* (1882), 46 J. P. 360.

(*f*) *Rex* v. *Ward* (1836), 4 A. & E. 384; overruling *Rex* v. *Russell* (1827), 6 B. & C. 566. See also *R.* v. *Train* (1862), 2 B. & S. 640; *Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423, Jessell, M.R., at p. 426; *Denaby and Cadeby Main Collieries, Ltd.* v. *Anson*, [1911] 1 K. B. 171, FLETCHER MOULTON, L.J., at p. 205.

(*g*) *R.* v. *Betts* (1850), 16 Q. B. 1022; *R.* v. *Russell* (1854), 3 E. & B. 942.

(*h*) CROMPTON, J., in *R.* v. *Train*, *supra*. The practice of putting trestles on a newly repaired highway for the regulation of traffic is well known and understood, and not reasonable to disturb (CROMPTON, J., in *R.* v. *Richmond JJ.* (1860), 24 J. P. 422).

(*i*) *Rex* v. *Tindall* (1837), 6 A. & E. 143. See also *Squire* v. *Campbell* (1836), 1 My. & Cr. 459, 486.

obstruction to the public was inappreciable, it was held that the judge was right in directing a verdict of not guilty to be entered (*k*). Where on indictment for obstructing a highway by erecting a coffee stall in the middle of the roadway of a public street, and the jury found that it was an obstruction but that it did not appreciably interfere with the traffic in the street, it was held that the findings did not justify the entry of a verdict of guilty (*l*).

Where the owner of the soil of a highway running through woods claimed an injunction to restrain trespasses by some undergraduates who had used lamps for catching moths by night on the highway and on land adjoining, the injunction was refused, the trespasses being merely technical and the defendants never threatening or intending to infringe any rights of property, and abandoning their pursuit when asked to do so (*m*).

A highway authority may agree with an adjoining owner for the straightening of a boundary fence by a give-and-take line (*n*).

The erecting of a gate across a highway is a nuisance even if it is not locked or fastened, but may be opened or shut at the pleasure of passengers, "for it is not so free and easy a passage as if no such inclosure had been, for women and old men are more troubled with opening gates than they should be if there were none" (*o*). And if a footway has been dedicated to the public with a stile two feet high across it, it is a nuisance to remove the stile and erect a five-bar gate in its place (*p*).

Where a company, without statutory powers, for the purpose of profit to themselves, placed telegraph posts upon a highway with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being found by the

(*k*) *R.* v. *Leprue* (1866), 30 J. P. 723; *S.C.*, *R.* v. *Lepine*, 15 L. T. (N.S.) 158.

(*l*) *Rex* v. *Bartholomew*, [1908] 1 K. B. 554.

(*m*) *Fielden* v. *Cox* (1906), 22 T. L. R. 411.

(*n*) *Portsmouth Corporation* v. *Hall* (1907), 71 J. P. 564; *R.* v. *Burrell* (1867), 10 Cox C. C. 462.

(*o*) *James* v. *Hayward* (6 Car. I), Cro. Car. 184.

(*p*) *Bateman* v. *Burge* (1834), 6 C. & P. 391. The question arose in *Rundle* v. *Hearle*, [1898] 2 Q. B. 83, as to the liability to repair a stile across a public footpath. The defendant was the occupier of two adjoining fields through which ran a public footpath crossing the fence between the two fields by means of a stile. The defendant and his predecessors in occupation had occasionally done slight repairs to the footpath and the stile; but there was no evidence that he or they had ever been required by the highway authority to do so. The plaintiff, who was using the footpath as a member of the public, fell in getting over the stile in consequence of the stile being out of repair and was injured. He sued the defendant charging that he was liable to repair *ratione tenuræ*. It was held that the fact of repairs done by the defendant and his predecessors being consistent with such repairs having been done by them for their own benefit, was no evidence of any liability to repair *ratione tenuræ*.

jury to be of such size and solidity as to obstruct and prevent the passage of horses and carriages or foot passengers, it was held that they were guilty of an indictable nuisance; and it was held that no defence was afforded by the fact that the posts were not placed on the hard or metalled part of the highway, or upon a footpath artificially formed upon it, and that sufficient space was left for the public traffic (*q*).

Where certain persons, with the consent of the vestry, but without statutory powers, laid down a tramway in a public street, and the jury found that accidents had happened in consequence of the tramway being laid down, that the tramway was a nuisance and an obstruction in a substantial degree of the ordinary use of the highway for carriages and horses, and that it rendered the highway unsafe and inconvenient in a substantial degree, the court held that this finding amounted to a finding of guilty on an indictment for nuisance, and the defendants were not allowed to give evidence to show that a great number of persons were carried along the tramway, that a saving of money was effected thereby, that the tramway was not a nuisance or an obstruction, and that it was a great advantage to the public in general who used the highway (*r*). Where a tramway is laid across a highway by persons acting without statutory powers, and the tramway amounts to a nuisance, it is unlawful even if it has been laid and continued under the licence of the highway authority (*s*).

It is a nuisance at common law to dig trenches in a highway for the purpose of laying down gas or water pipes. Thus, where a company, without parliamentary powers, obstructed a highway by taking up the pavement and digging trenches in the roadway and footway in order to lay down service pipes for the supply of gas to private houses, it was held that the company were liable to be indicted, and could not justify the obstruction under the authority and direction of the owners of the adjoining houses (*t*). The court has granted an injunction, at the instance of the owner

(*q*) *R.* v. *United Kingdom Electric Telegraph Co., Limited* (1862), 31 L. J. M. C. 166. Statutory powers are now given to telegraph companies to maintain telegraphs and posts in and across highways with the consent of the highway authority. See *post*, p. 129.

(*r*) *R.* v. *Train* (1862), 2 B. & S. 640. *Cf. Rex* v. *Morris* (1830), 1 B. & Ad. 441; *R.* v. *Charlesworth* (1851), 16 Q. B. 1012. Tramways may now be constructed under the powers of the Tramways Act, 1870 (33 & 34 Vict. c. 78).

(*s*) *Att.-Gen.* v. *Barker* (1900), 83 L. T. 245. It has been held in the Irish Courts that a county council cannot legally sanction the erection of a permanent structure not authorised by the necessities of the public service along or upon a county road (*Att.-Gen.* v. *Mayo County Council*, [1902] 1 I. R. 13).

(*t*) *R.* v. *Longton Gas Co.* (1860), 29 L. J. M. C. 118.

of the soil, to restrain the continuance of pipes in such a case (*u*); but an injunction has been refused where the information was filed at the instigation of a rival gas company (*x*). The Gasworks Clauses Act, 1847 (*y*), gives powers to gas companies to break up streets, and erect lamp posts after notice to the highway authority; and these powers as to breaking up streets are incorporated in the Electricity (Supply) Acts, 1882 to 1919 (*z*). Similar provisions as to breaking up streets are contained in the Waterworks Clauses Act, 1847 (*a*). Provisions are also contained in the Telegraph Act, 1863, in respect of telegraph and telephone wires and cables (*b*).

Where an obstruction is made in a highway, proceedings should be taken against the person making it. A railway company constructed a railway on the level across a highway in an urban district. Subsequently the defendants (a colliery company) worked coal mines in a proper and usual manner beneath the highway, with the result that a gradual and uniform subsidence to the extent of about ten feet vertically took place of the highway, railway, and surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway company placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway. In an action against the defendants (the colliery company) for damages for the obstruction to the highway, it was held that they were not liable (*c*), but that the remedy, if any, was against the railway company (*cc*).

There is no duty on a frontager to keep in repair a highway which has been taken over by the local authority. Thus where a local authority, in raising the level of the pavement outside the defendant's house, left out one or two flagstones in order not to shut out access to a coal shoot, and a passer-by tripped in the hole and was injured, the defendant was held not liable (*d*).

Dangerous Erections or Excavations Adjoining Highway (*dd*).—

(*u*) *Goodson* v. *Richardson* (1874), L. R. 9 Ch. 221.

(*x*) *Att.-Gen.* v. *Sheffield Gas Consumers' Co.* (1853), 3 De G. M. & G. 304; *Att.-Gen.* v. *Cambridge Gas Consumers' Co.* (1868), L. R. 4 Ch. 71.

(*y*) 10 & 11 Vict. c. 15, ss. 6—12.

(*z*) 45 & 46 Vict. c. 56, s. 12 (2); 62 & 63 Vict. c. 19; 9 & 10 Geo. 5, c. 100.

(*a*) 10 & 11 Vict. c. 17, ss. 28—34.

(*b*) 26 & 27 Vict. c. 112, ss. 6—22; the Telegraph Act, 1878 (41 & 42 Vict. c. 76); the Public Health Acts Amendment Act, 1890, ss. 13—15, *post*, and other Acts.

(*c*) *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

(*cc*) *Ibid.*, p. 307, WRIGHT, J. See also COLLINS, J., at p. 310.

(*d*) *Horridge* v. *Makinson*, (1915) 84 L. J. (K.B.) 1294; 31 T. L. R. 389.

(*dd*) See article J. P. Jo., Jan. 16, 1915.

The occupier of land adjoining a highway is not entitled, in using his land, to make any erection or excavation thereon so as to render the way unsafe to persons using it with ordinary care. He is guilty of a public nuisance in making such a dangerous erection or excavation, even though the danger consists in the risk of accidentally deviating from the road; "for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to the highway" (*e*).

Thus, where the occupier of land abutting on a public footway, in the course of building a house on such land, excavated an area which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area and was killed, it was held that the occupier of the land was liable to an action under Lord Campbell's Act (9 & 10 Vict. c. 93) (*f*). The area in this case was separated from the path by a kerbstone, which was intended for the reception of upright iron rails.

Where, before the defendant's house, there was an area, which was descended to by three steps from the street, and from which there was a door leading into the basement storey of the house, and there was no railing or fence to guard the area from the street, and the plaintiff, passing by on a dark night, fell into the area and had his arm broken, he was held entitled to recover against the defendant (*g*). The defence was that the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them. Lord ELLENBOROUGH, C.J., held that, however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance (*gg*). The occupier of land adjoining a highway in which some prior occupier has made an excavation by the side of the highway is obliged to keep it fenced off (*h*).

(*e*) *Per cur.*, *Barnes* v. *Ward* (1850), 9 C. B. 392. See also *R.* v. *Watson* (2 Anne), 2 Ld. Raym. 856; *S.C.*, *R.* v. *Watts*, 1 Salk. 357; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Wettor* v. *Dunk* (1864), 4 F. & F. 298.

(*f*) *Barnes* v. *Ward*, *supra*. And see *Crane* v. *South Suburban Gas Co.*, [1916] 1 K. B. 33; 32 T. L. R. 74.

(*g*) *Coupland* v. *Hardingham* (1813), 2 Camp. 398; *cf. Jarvis* v. *Dean* (1826), 3 Bing. 447.

(*gg*) It may be observed, however, that on similar evidence it might now be left to the jury to say whether the road had not been dedicated subject to the nuisance. See *ante*, p. 56.

(*h*) *Att.-Gen.* v. *Roe*, [1915] 1 Ch. 235.

But the owner is not liable unless it be shown that he created the danger constituting the nuisance, or that he continued the danger, or that with knowledge of the danger he abstained for an unreasonable time from abating or remedying it. Thus where a trespasser had broken the defendant's area railing, fronting the highway, without the defendant's knowledge, and before sufficient time had elapsed for him to have found out the defect with reasonable care, a boy crept through the railing and injured himself by falling from a slate ledge inside the railing, the defendant was held not liable (*hh*).

The plaintiff, in passing along a highway at night, fell into a hoist-hole, which was within fourteen inches of the public way and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor. On these facts the court held that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole, and that the hole was near enough to the highway to constitute a nuisance (*i*). ERLE, C.J., observed: "The hole was not upon the public highway, but distant from it about fourteen inches. I think, however, the defendants (assuming them to be in possession of the adjoining premises) would be liable for a nuisance to the highway, if the excavation was so near to it that a person lawfully using the way, and using ordinary caution, accidentally slipping, might fall into it."

The defendants were the owners of a low wall, eighteen inches high, immediately abutting upon a public highway. On the top of the wall was a row of sharp spikes, which, as the jury found, was a nuisance to the highway. The plaintiff, a girl aged five years, was found standing by the wall with her arm bleeding from a wound, such as might have been caused by her falling upon the spikes. No one witnessed the accident. The plaintiff sued the defendants for damages for the injury sustained. At the trial the plaintiff was not called as a witness, nor was any other evidence than the above given as to how the accident happened,

(*hh*) *Barker* v. *Herbert*, 27 T. L. R. 488; [1911] 2 K. B. 633. In *Horridge* v. *Makinson* (1915), 79 J. P. 484; 84 L. J. (K.B.) 1294, the liability of an occupier of land adjoining a highway for a nuisance on such land, as laid down in *Barker* v. *Herbert, supra*, was distinguished from such occupier's liability for a nuisance *on* the highway; and, following *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 221, the court held that there is no duty imposed on a frontager to keep in repair a highway vested in and controlled by the local authority, and he is not liable for, as having permitted to continue, a hole left in the pavement by the authority and amounting to a nuisance.

(*i*) *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53.

except that of a witness who shortly before the accident saw the plaintiff climbing up upon the wall and told her to get down, which she did. It was held that there was evidence to go to the jury that the nuisance was the cause of the plaintiff's injury (*k*).

The distance of the excavation from the highway is a material and important element as regards the question of liability.

In an old case it was laid down that "if A., seised of a waste adjacent to a highway, digs a pit within thirty-six feet of the highway, and the mare of B. escapes into the waste and falls into the pit, and dies there, yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B., but it was the default of B. himself that his mare escaped into the waste" (*l*).

The rule laid down in modern cases is that to subject the occupier to an action, the excavation must be so near the way as to be substantially adjoining. The law was thus stated by POLLOCK, C.B., in delivering the judgment of the Court of Exchequer: "When an excavation is made adjoining to a public way, so that persons walking upon it might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury, no one can tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous" (*m*). This case was followed

(*k*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199. In *Evans* v. *Edinburgh Corporation*, [1915] S. C. 895; [1916] 2 A. C. 45, where the pursuer was injured by a door in a garden wall adjoining the street suddenly opening outwards on to the street and striking him in the face, the House of Lords held that having a door opening outwards upon a street did not *per se* infer negligence on the part of the owners or of the corporation, and the door was not an obstruction within s. 151 of the Edinburgh Municipal and Police Act, 1879, which the corporation had power to remove.

(*l*) *Blithe* v. *Topham* (5 Jac. I.), 1 Roll. Abr. 88.

(*m*) *Hardcastle* v. *South Yorkshire Rail. and River Dun Co.* (1859), 4 H. & N. 67; *Binks* v. *South Yorkshire Rail. and River Dun Co.* (1862), 3 B. & S. 244; *Melville* v. *Renfrewshire County Council*, [1920] S. C. 61.

in *Hounsell* v. *Smyth* (*n*), where it was held that the owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance, *i.e.*, to be dangerous to persons lawfully using it.

Where the defendant company placed a heap of earth and refuse on their land adjoining a highway, and the plaintiff's horse being driven at night along the highway, shied at the heap, upset the plaintiff's cart, and injured the plaintiff, it was held that if the heap was of such a nature as to be dangerous by causing horses passing along the highway to shy, it was a public nuisance; and evidence that other horses had shied at the heap on the same day was held to be admissible, as tending to show that the heap was dangerous, and likely to cause horses to shy (*o*). Where the defendant had the wall of his premises, six feet high, abutting on a highway which had been by trespassers and others knocked or pulled down till it projected about eight inches above and twenty-one inches across one side of the highway, and it was proved that the defendant knew of this state of things about eight days before an accident happened to the plaintiff whose horse was caught and injured, it was held that the defendant was liable for the consequences of not putting the premises in a state of safety to passengers (*p*). The defendant corporation, who were also the highway and lighting authority, had erected a post at the entrance and in the centre of a footpath to prevent cattle straying up the footpath, and near the post they placed a lamp, which they were in the habit of lighting at nights. The plaintiff was passing along the footpath at night, when the lamp was out or not lighted while lamps within 100 yards were lighted, and in consequence of the darkness came against the post and suffered injuries. The Court of Appeal held that inasmuch as the lamp was not lighted, and the night was dark, the defendant corporation were liable (*q*). Where there is no duty to light the streets there is no cause of action where the accident happens through a light being out (*r*). Where the defendants were under a duty to light the streets, with *power* to erect refuges, and by lighting the refuges had led the public to believe they continued to be lighted, a taxi-driver who drove his cab on a dark night into the posts of a refuge, the lights

(*n*) (1860), 7 C. B. (N.S.) 731. In the case of an unfenced quarry in open or uninclosed land, see the Quarry (Fencing) Act, 1887, and notes to s. 70 of the Highway Act, 1835, *post*.

(*o*) *Brown* v. *Eastern and Midland Rail. Co.* (1889), 22 Q. B. D. 391.

(*p*) *Silverton* v. *Marriott* (1888), 52 J. P. 677.

(*q*) *Lamley* v. *Mayor, etc. of East Retford* (1891), 55 J. P. 133.

(*r*) *Young* v. *Islington* (1896), 60 J. P. 82; *Mellor* v. *Heywood* (1884), 48 J. P. 148. See also the cases collected in the notes to s. 144 of the Public Health Act, 1875, *post*.

of which had gone out, and was injured, was held entitled to recover damages from the defendants upon the ground that they had imposed upon themselves a duty to watch the lamps on the refuges (*rr*). "A person clothed with statutory power to do an act must in doing it exercise reasonable care to prevent injury to others" (*s*). But where a statute gave a railway company, who were not the lighting authority, the merely passive power of "maintaining" an existing post in a highway, there was no duty on them to light the post on a dark night when it was almost invisible owing to the compliance of the lighting authority with the Reduction of Lighting Regulations; and so a taxi-driver who collided with the post and damaged his cab failed to recover damages from the company (*ss*). Where a heavy lamp projected from a house several feet over the pavement, fell upon the plaintiff and injured him, and it was proved that the lamp had been recently repaired by an experienced gasfitter employed by the defendant, but had been repaired, as the jury found, negligently, the court held that the defendant was liable, although there was no evidence of personal negligence on his part (*t*).

Excessive and Unreasonable User.—It is an indictable nuisance if a man with a cart use a common pack and horse way, so as to plough it, and render it less convenient for riders (*tt*). So, where an information set forth that no waggon ought to carry more than 2,000 weight, and that the defendant, a common carrier, used a waggon with four wheels, *et cum insuitato numero equorum*, in which he carried 3,000 or 4,000 weight at one time, whereby he spoiled the highway leading from Oxford to London, the court held that carrying an excessive weight was a public nuisance (*u*). An injunction may be granted restraining the use of heavy locomotives on a highway in such a way as to cause a public nuisance, notwithstanding the special remedy for excessive weight and extraordinary traffic in the Highways and Locomotives (Amend-

(*rr*) *Baldock* v. *Westminster City Council* (1918), 88 L. J. (K.B.) 502; 35 T. L. R. 188. And see *McClelland* v. *Manchester* (*Lord Mayor of*), 28 T. L. R. 21; [1912] 1 K. B. 118, *post*, p. 472.

(*s*) Per Lord WRENBURY, in *Great Central Railway* v. *Hewlett*, [1916] 2 A. C. 511.

(*ss*) *Great Central Railway* v. *Hewlett*, *supra*. And see *Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462, and *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132.

(*t*) *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314. See also *Mullan* v. *Forrester*, [1921] 2 I. R. 412. See also *Sandford* v. *Clarke* (1888), 21 Q. B. D. 398, and *Bowen* v. *Anderson*, [1894] 1 Q. B. 165, as to defective cellar plates in pavements; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335.

(*tt*) See *R.* v. *Leech* (3 Anne), 6 Mod. 145, where the defendant was indicted for bringing a large ship of 300 tons into Billingsgate dock.

(*u*) *R.* v. *Egerley* (17 Car.), 3 Salk. 183. As to extraordinary traffic and excessive weight, see the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23; the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, and notes, *post*.

ment) Act, 1878, *post* (*x*). Where a seaside parade was constructed by a local authority under statute, and used for limited public purposes such as foot passengers, perambulators, invalid carriages and similar vehicles, an injunction was granted restraining the local authority from allowing it to be used for horses, motor cars and motor races (*y*).

On an indictment for obstructing a highway by using a traction engine and trucks, it was held that the defendants could not be found guilty unless they had created a substantial obstruction, and occasioned delay and inconvenience to the public substantially greater than would have been caused by horses and carts (*z*). Where a person sustained personal injuries through his horses being frightened by a traction steam engine used on a highway, ERLE, C.J., held that he was entitled to recover against the owner of the engine, "if the engine was calculated by its noise and appearance to frighten horses, so as to make the use of the highway dangerous to persons riding or driving horses. For the defendant has clearly no right to make a profit at the expense of the security of the public" (*a*).

Where a steam roller or traction engine is otherwise lawfully on a highway, but it is proved to be a nuisance, and in consequence of its being a nuisance it causes damage to the plaintiff and an accident to take place, an action will lie; and it is no defence that the statutory provisions have been complied with (*b*). Where a steam roller was in motion and made a noise, some steam was blown off, and a white vapour was emitted; the puffs made were

(*x*) *Att.-Gen.* v. *Scott*, [1904] 1 K. B. 404. In this case an interim injunction was granted until the trial of the action, the court pointing out that it was no answer to an application for an interim injunction that the damage to the road would not have happened but for the neglect of the county council to keep it in a proper state of repair. At the trial JELF, J., on the facts proved refused a perpetual injunction, and his decision was affirmed by the Court of Appeal ([1905] 2 K. B. 160).

(*y*) *Att.-Gen.* v. *Blackpool Corporation* (1907), 71 J. P. 478 (Lancaster County Palatine Court, LEIGH CLARE, V.-C.).

(*z*) HAWKINS, J., *R.* v. *Chittenden* (1885), 15 Cox C. C. 725.

(*a*) *Watkins* v. *Reddin* (1861), 2 F. & F. 629. The use of locomotives on highways is regulated by the Locomotive Act, 1861 (24 & 25 Vict. c. 70), the Locomotives Act, 1865 (28 & 29 Vict. c. 83), the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), Part II., and the Locomotives Act, 1898 (61 & 62 Vict. c. 29), *post*. These Acts do not authorise the use of locomotives so constructed or used as to be a nuisance.

(*b*) *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. Q. B. 618; *Galer* v. *Rawson* (1889), 6 T. L. R. 17; *Bantwick* v. *Rogers* (1891), 7 T. L. R. 542. See also cases cited in note to s. 13 of the Locomotive Act, 1861, *post*, and *Leonard* v. *Monaghan County Council* (1913), 77 J. P. (Jo.) 305. In *Cavan County Council and Bailieborough Rural District Council* v. *Kane*, [1913] 2 I. R. 250, a traction engine, which damaged a public road by reason of its excessive weight, was held a public nuisance, although constructed in compliance with the Locomotive Acts of 1861 and 1865.

necessary as the steam roller was going up an incline; a flagman was some twenty yards in front; the plaintiff's cab was being driven from the opposite direction, when the horse took fright and the cab was overturned; the horse was a quiet one; and the jury found that the steam roller, used as it was, was a nuisance, but that it was not used negligently: a Divisional Court (CHARLES and COLLINS, JJ.) held that the plaintiff must succeed (*b*).

Where a motor omnibus, whilst travelling upon a highway during daylight, does damage to a fixed structure upon a footway, such as a lamp post, by a part of the omnibus overhanging the footway, the fact of the collision is primâ facie evidence of negligence on the part of the driver of the omnibus (*c*). To displace such evidence it must be shown that the driver was at the time using reasonable care in driving the omnibus, and that the collision occurred notwithstanding such care (*c*). Where an accident happens to a passenger owing to a motor omnibus skidding, the mere fact that the owner of the motor omnibus places it on the road to ply for passengers knowing that all such vehicles have a tendency to skid when the road is in a greasy or slippery condition, is not evidence of negligence or of nuisance (*d*).

There is no Act of Parliament or law which relieves the driver of fire engines of the duty to take every possible step to avoid running over passengers in the highway, even though such passengers have failed to take notice of the warning bell, or have become flurried (*e*).

As to the use of a perambulator on a public footpath, it is a question of fact whether it is of such size and weight as to inconvenience passengers or to injure the soil; if so, it is a nuisance. If not, it is justified by the easement, being a usual accompaniment of a large class of foot passengers (*f*).

Carriages are lawfully in the highway for the purpose of passage only, and it is a nuisance if they remain an unreasonable time. Thus, where the proprietor of stage coaches caused them to stand in the public highway near Charing Cross for three-quarters of an hour at a time, taking in parcels and waiting for passengers, so

(*c*) *Barnes Urban District Council* v. *London General Omnibus Co.* (1909), 100 L. T. 115; *Isaac Walton & Co.* v. *Vanguard Motor Bus Co.* (1908), 72 J. P. 505; *Gibbons* v. *Vanguard Motor Bus Co., Ltd.* (1908), 72 J. P. 506.

(*d*) *Wing* v. *London General Omnibus Co., Limited*, [1909] 2 K. B. 652; *Parker* v. *London General Omnibus Co.* (1909), 101 L. T. 623. But a motor car, which has its steering gear, by reason of wear, in such imperfect condition that the driver is liable to lose control of the steering, is a thing which on a highway is necessarily dangerous to persons using the highway, and to cause it to be driven on a highway amounts to negligence even in the absence of knowledge of the defect. *Hutchins* v. *Maunder*, 37 T. L. R. 72.

(*e*) *Scudder* v. *London County Council* (1909), Times, July 15th [C.A.].

(*f*) *R.* v. *Mathias* (1861), 2 F. & F. 570.

that private carriages could rarely draw up, and considerable difficulty was experienced in passing along that side of the street, it was held to be an indictable nuisance. Lord ELLENBOROUGH, C.J., said: "The King's highway is not to be used as a stable-yard. A stage coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another" (*g*). And where a motor omnibus company had turned, shunted, stood and repaired their omnibuses at the terminus of their line in such a way that the vibration, noise and fumes therefrom were a nuisance and interfered with the comfortable use and enjoyment of adjacent houses, it was held that there had been such an excessive user of the streets as to entitle the householders to an injunction (*gg*).

Whether the extent of the user of the highway in front of business premises for the purpose of loading and unloading goods is excessive is a question of fact, and in answering that question all the circumstances of the case have to be taken into consideration (*h*).

Where the defendant farmed land on both sides of the highway, and his servants removed a large agricultural roller from one of his fields across the highway to the gate of the opposite field, and left it for several hours on the greensward at the roadside, with its shafts turned up, but projecting a few inches over the metalled part of the road, and a pony being driven past shied at the roller and caused the death of the person driving, it was held to be a proper question for the jury, whether the placing the roller where it was and leaving it there was a reasonable user of the highway (*hh*). In this case there was evidence that other horses had been frightened by the roller before the accident happened, but it was not shown that the defendant was aware of this.

A house-van attached to a steam plough was left by the defendant for the night on the grassy side of a highway, four or five feet from the metalled part of the way, and a mare being driven past shied at it and kicked her driver, causing his death. DENMAN, J., left it to the jury to say whether the leaving the van there was (1) reasonable or not, (2) negligent or not, (3) dangerous to vehicles passing along the metalled part of the road; and, on further consideration, the learned judge laid down the principle that "if there be an act done upon any part of the highway, which

(*g*) *Rex* v. *Cross* (1812), 3 Camp. 224. As to washing carriages in a mews, see *Chelsea (Vestry)* v. *Stoddard* (1879), 43 J. P. 784, in note (*n*), p. 23, *ante*.

(*gg*) *Robinson* v. *London General Omnibus Co., Ltd.* (1910), 74 J. P. 161.

(*h*) *Att.-Gen.* v. *W. H. Smith & Son* (1910), 74 J. P. 313.

(*hh*) *Wilkins* v. *Day* (1883), 12 Q. B. D. 110.

is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage" (*i*).

The plaintiff's horse was frightened at the approach of an electric tramcar and became restive, when the plaintiff held up his hand and shouted to the driver of the car to stop until he could get past it. The plaintiff's horse and trap were not then upon the metals along which the tramcar was approaching. The driver of the car, in disregard of the plaintiff's signal and shouting, drove the car on without any stop or abatement of pace, whereupon the plaintiff's horse, when the car was close upon him, from fright, swerved round, so that the trap came upon the tramway, and the tramcar ran into it, and the plaintiff was thrown out and injured. The Court of Appeal held that there was no pretence for the proposition that because the defendant company were authorised to run tramways on the highway their drivers were exempt from the common law obligation to take reasonable care not to injure persons lawfully using the highway (*k*).

Where a waggoner, having warehouses in a public street, occupied one side of the street in loading and unloading his waggons, for several hours at a time, both day and night, having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on that side ready for loading, it was held that he was indictable for nuisance, although there was room for two carriages to pass on the opposite side of the street (*l*).

So where a timber merchant cut logs of timber in the street adjoining his timber yard, it was held that he was guilty of a nuisance; and it was no defence that he could not otherwise get them into his premises. Lord ELLENBOROUGH, C.J., said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to

(*i*) *Harris* v. *Mobbs* (1878), 3 Ex. D. 268. See *post*, p. 145.

(*k*) *Rattee* v. *Norwich Electric Tramway Co.* (1902), 18 T. L. R. 562.

(*l*) *Rex* v. *Russell* (1805), 6 East, 427; *cf.* *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400, and see a number of illustrations of reasonable and unreasonable user put by JESSEL, M.R., in *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713, and COLLINS, J., in *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. Q. B. 618.

complain, and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard, and if the street be narrow, he must remove to a more commodious situation for carrying on his business" (*m*).

Where the defendants, who kept a co-operative store at which they carried on a large business at premises situated in a street the roadway of which was less than twenty-four feet wide, and kept as many as six vans at once during every alternate hour in the daytime loading and unloading goods at their premises, thus occupying half the width of the street and seriously obstructing the passage of vehicles through it, the Court of Appeal held that this was an unreasonable use of the highway amounting to a public nuisance, and restrained the continuance of it by injunction (*n*).

Where the defendant's premises were approached by means of three passages, and the defendant, in rebuilding his premises, carried on building operations for several months, FRY, J., held that it was not reasonable to use one passage only, though the most convenient, for the carriage of building materials and rubbish, but that the inconvenience necessarily created thereby should have been distributed over the three passages, and that the defendant ought not to have carried such materials and rubbish during the busiest hours of the day, but should have diminished the inconvenience by carrying them early in the morning or late at night (*o*). In such a case the whole circumstances must be looked at, and the question for the jury is, "whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience. The jury are not to consider solely what was convenient for the business of the defendants" (*p*).

Miscellaneous Nuisances on or near Highway.—Any act or omission, whether on or near a highway, by which danger or inconvenience is caused to the public in using the highway, is an offence at common law.

Negligently blasting stone in a quarry, and thereby projecting large pieces of stone so as to endanger the safety of persons on the highway adjoining the quarry, is a misdemeanor indictable at

(*m*) *Rex* v. *Jones* (1812), 3 Camp. 230.

(*n*) *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276.

(*o*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542.

(*p*) HONEYMAN, J., *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400.

common law (*q*); so likewise is the keeping of dangerously inflammable materials near to a highway (*r*).

"Also it seemeth clear that it is a like nuisance (*i.e.* at common law) to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage" (*rr*).

"Every railway which, without express parliamentary sanction, ran by the side of a highway, so as to frighten horses, etc., would be a nuisance but for the parliamentary authority under which it was made. So if a man kept a ferocious and noisy dog so near a highway as to be likely to frighten horses on it by his barking" (*s*).

It is an indictable nuisance to expose the dead body of a child near a highway where many people are certain to pass and repass, if the exposure is calculated to shock and disgust the passers-by and outrage public decency (*t*).

It is an unlawful act to turn a horse which is known to be vicious on to a common, across which there is an unfenced public pathway; and where in such circumstances a child had been killed by a kick from a horse, it was held that the prisoner was rightly convicted of manslaughter, whether the child was on or near the highway at the time (*u*).

If the occupier of a house adjoining the highway exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not necessary that the effigies should be libellous, or that the crowd should consist of idle, disorderly, or dissolute persons (*x*). Where an obstruction to access to adjacent premises had been caused by reason of the assembling of a crowd of persons on several successive nights previously to the opening of the doors of a theatre, it was held that the lessee of the theatre was liable for

(*q*) *R.* v. *Mutters* (1864), 34 L. J. M. C. 22; L. & C. 491; and see, as to duty of a quarry-owner who brings explosives on to his premises, *Miles* v. *Forest Rock Granite Co. (Leicestershire), Ltd.*, 34 T. L. R. 500.

(*r*) *R.* v. *Lister* (1857), 26 L. J. M. C. 196.

(*rr*) 1 Hawk. P. C. 701 (ed. 1824). And see *Lemmon* v. *Webb*, [1894] 3 Ch. at p. 24, per KAY, L.J.; 70 L. T. 712; *Smith* v. *Giddy*, [1904] 2 K. B. 448; 91 L. T. 296; and *Thorne* v. *Roberts* (1909), 128 L. T. Jo. 155 (judgment of His Honour Judge HOWLAND ROBERTS).

(*s*) *Per cur.* (DENMAN and STEPHEN, JJ.), in *Brown* v. *Eastern and Midland Rail. Co.* (1889), 22 Q. B. D. 391.

(*t*) *R.* v. *Clark* (1883), 15 Cox C. C. 171. And see *R.* v. *John and Ellen Richardson*, Times, Sept. 12th, 1896 (City of London Sessions).

(*u*) *R.* v. *Dant* (1865), 29 J. P. 359. As to a horse not known to be vicious, see *Cox* v. *Burbidge*, *post*, p. 150.

(*x*) *Rex* v. *Carlile* (1834), 6 C. & P. 636. See a like case noted at 46 J. P. 19 (1882).

the obstruction (*y*). Where the occupier of premises adjoining a highway invited persons to shoot pigeons there, the probable and actual consequence of which was that idle people collected in the highways and fields near the spot, discharging firearms and creating alarm and disturbance, he was held to be indictable for nuisance (*z*). Again, where it had been proved that a nuisance was caused by cabs or carriages driving to or leaving certain club premises, and the whistling for cabs and carriages, and by crowds assembling to witness boxing contests or entertainments held at the club premises, an injunction was granted against the defendant, the proprietor of the club, restraining him from continuing the nuisance (*a*).

"A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it" (*b*).

Particular Damage resulting from Public Nuisance. — In general no action will lie for a public nuisance, the damage being common to all the subjects of the Crown. But "if any particular person after the nuisance made has more particular damage than any other, in such case, and because of his particular damage, he shall have particular action, as if he and his horse fall into a ditch dug in the highway, whereby he receives hurt and loss" (*c*). A person who sustains a particular injury from an obstruction on a highway may maintain an action for an injunction, and the Attorney-General need not be a party (*d*).

(*y*) *Barber* v. *Penley*, [1893] 2 Ch. 447, approved in *Lyons* v. *Gulliver*, [1914] 1 Ch. 631. In *Rex* v. *Sarmon* (1758), 1 Burr. 516, an indictment for setting a person on a footway to distribute handbills was quashed. See *Benjamin* v. *Bloomstein*, Times, Oct. 26th, 1922.

(*z*) *Rex* v. *Moore* (1832), 3 B. & Ad. 184. See, further, *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25; *Inchbold* v. *Robinson*; *Inchbold* v. *Barrington* (1869), L. R. 4 Ch. 388. *Cf.*, also, cases decided under s. 72 of the Highway Act, 1835, *post*.

(*a*) *Bellamy* v. *Wells* (1891), 39 W. R. 158.

(*b*) WILLS, J., in *Ex parte Lewis* (1888), 21 Q. B. D., p. 197. See also notes to s. 72 of the Highway Act, 1835, *post*. No right on the part of the general public to hold meetings on a common, public square, or on a foreshore, or on private land, is known to the law (*De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155; *R.* v. *Graham and Burns* (1888), 4 T. L. R. 212; *Brighton Corporation* v. *Packham* (1908), 72 J. P. 318). But the fact that a public meeting is held on a highway does not necessarily make the meeting unlawful. Whether it is unlawful or not depends on the circumstances in which it is held, *e.g.* whether or not an obstruction is caused. *Burden* v. *Rigler*, [1911] 1 K. B. 337. See, further, article in (1911) J. P. Jo. p. 14.

(*c*) Viner Abr. Chimin Common, D. 2; Coke Litt, 56 a.

(*d*) *Cook* v. *Bath* (*Mayor of*) (1868), L. R. 6 Eq. 177.

"There are three things which the plaintiff must substantiate beyond the existence of the mere public nuisance before he can be entitled to recover. . . . In order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct and substantial" (*e*).

If a person unlawfully encroaches upon a highway or upon the roadside waste, the district council or highway authority are entitled to abate the encroachment and to recover as special damage, "by reason of his unlawful and indictable act," the expenses of so doing from the person guilty of the encroachment (*f*).

Where the plaintiff has suffered personal injuries, as by falling against an obstruction in a highway, he may recover damages against the person who caused the obstruction, but "two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff" (*g*). Thus, where the defendant, for the purpose of making some repairs to his house, had put up a pole across part of the highway, a free passage being left by another branch or street in the same direction, and the plaintiff riding violently late in the evening, rode against it, and was thrown down with his horse and injured, BAYLEY, J., directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find for the defendant, which they did. This direction was upheld, and a new trial refused, the court thinking that if the plaintiff had used ordinary care he must have seen the obstruction, so that the accident appeared to have happened entirely through his own fault (*h*). And where an elm tree growing on the defendant's land was blown down by a violent gale without any fault of the defendant and fell across a

(*e*) BRETT, J.: *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400. See also the judgments in *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111.

(*f*) *Louth Urban District Council* v. *West* (1896), 65 L. J. Q. B. 535. Power was given to turnpike trustees under 3 Geo. 4, c. 126, s. 118, to remove encroachments, etc. at the expense of the persons making the same And see *R.* v. *Greenlaw Road Trustees* (1879), 4 Q. B. D. 447, as to a toll-house no longer required.

(*g*) Lord ELLENBOROUGH, C.J.: *Butterfield* v. *Forrester*, *infra*. Where the defendant placed a carpet on the pavement between the front door of his house and the carriageway, and the plaintiff passing, without negligence, tripped over it, fell and was injured, the defendant was held liable in damages (*Watson* v. *Ellis* (1885), 49 J. P. 148 n. See, further, *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Cooke* v. *Midland Rail. Co. of Ireland*, [1909] A. C. 229; *Lowery* v. *Walker*, [1910] 1 K. B. 173; [1911] A. C. 10).

(*h*) *Butterfield* v. *Forrester* (1809), 11 East, 60.

highway, and without any subsequent negligence by the defendant the plaintiffs drove their motor car into the tree, the defendant was held not liable (*hh*).

A person who unlawfully places a dangerous thing in the carriageway, which is subsequently placed in the footpath by a third person, is liable to a person who has been injured by it (*i*).

Likewise a person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway or from meddling by third persons with his property. But he is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate. Thus where a soldier mounted an unattended steam motor lorry, belonging to the defendants, performed the four mechanical operations necessary to start it, and started it backwards, so that it ran into and damaged the plaintiff's shop front, the defendants were held not liable (*ii*).

Where a statute authorised the electrification of certain tramways in public streets, but did not authorise the laying down of raised rails for the temporary continuance of tramway traffic during the electrification of the lines, and the raised rails were a nuisance, it was held that the contractors were liable to an omnibus proprietor, whose omnibuses had been damaged by the rails so raised (*k*).

A fence by the side of a highway in a ruinous condition may be a nuisance, and if in consequence thereof a person suffers injuries, the owner may be liable. Thus, where a child of four years of age, attracted by some boys at play on the other side, put his foot on it, and it fell and injured him, and the jury found that the fence was very defective, but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over, the Court of Appeal held that the defective fence was a nuisance and the cause of injuries to the child, and the defendant was liable (*l*).

Where the plaintiff's carter was leading two horses drawing a cart along a highway up an incline, and one of the horses slipped and fell against a spiked iron fence belonging to the defendants, and received injuries from which it died (the fence had been erected for about seven years), it was held that the plaintiff's claim failed, there being no evidence of nuisance (*m*).

(*hh*) *Hudson* v. *Bray*, 33 T. L. R. 118.
(*i*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327.
(*ii*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148; 32 T. L. R. 82.
(*k*) *Tilling, Limited* v. *Dick, Kerr & Co., Limited*, [1905] 1 K. B. 562.
(*l*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320.
(*m*) *Gibson* v. *Plumstead Burial Board* (1897), 13 T L. R. 273.

Where a gas company, after laying down a gas main in a highway failed to reinstate the roadway properly and left it in a condition amounting to a public nuisance, in consequence of which the plaintiff suffered special damage, he was held entitled to recover from the company (*n*). But where a gas company opened a trench, and the local authority, under the Metropolis Management Act, 1855, reinstated the trench, although negligently, whereby the plaintiff was injured, it was held that the plaintiff had no cause of action against the gas company (*o*). Where a telephone company were lawfully engaged in laying telephone wires along a street, and in order to connect the tubes through which they passed the wires, it was necessary to obtain a flare from a benzoline lamp, which could not be done without the application of heat to the lamp, and the flare was obtained negligently, and the lamp in consequence exploded, and the plaintiff, who was passing by at the time, was injured, it was held that the company were liable (*p*).

In *Maxwell* v. *British Thomson Houston Co.* (*q*) a town council, who were the owners of tramways, entered into a contract with a contractor whereby the latter undertook to do the whole of the work of equipping the tramways for electric traction. The contractor entered into a sub-contract whereby the sub-contractor agreed to do part of the work, namely, the erection of the iron standards along the streets and the fixing of the wires thereto.

(*n*) *Goodson* v. *Sunbury Gas Consumers' Co., Limited* (1896), 60 J. P. 585. Section 11 of the Gasworks Clauses Act, 1847 (10 Vict. c. 15), which relates to delay in reinstating, does not apply to such a case.

In *Price* v. *South Metropolitan Gas Co.* (1896), 65 L. J. Q. B. 126, where a gas main in a highway had cracked in consequence of insufficient support, and there was an escape of gas for some time, and an explosion occurred and injured the plaintiff (a passenger on the highway), it was held the gas company were liable. In *Solomons* v. *Stepney Borough Council* (1905), 69 J. P. 360, an explosion in the apparatus of the manholes and conduits of the defendants' electrical cables in a street, whereby the plaintiff was injured, was held to be primâ facie evidence of negligence. See *Stacey* v. *Gas Light and Coke Co. and others* (1910), 9 L. G. R. 174 (*post*, p. 470). See further *Overton* v. *Freeman* (1852), 11 C. B. 867 (heap of stones); *Gandy* v. *Jubber* (1864), 33 L. J. Q. B. 151 (iron grating); *Gwinnell* v. *Eames* (1875), L. R. 10 C. P. 658 (iron grating); *Bowen* v. *Anderson*, [1894] 1 Q. B. 164 (coal plate); *Blake* v. *Thirst* (1863), 32 L. J. Ex. 188 (unfenced sewer excavation); *Byrne* v. *Boadle* (1863) (goods falling from upper storey); *Peachey* v. *Rowland* (1853), 22 L. J. C. P. 81; *Gray* v. *Pullen* (1865), 34 L. J. Q. B. 265 (negligently filling in trench); *Jones* v. *Rew* (1910), 103 L. T. 165; 74 J. P. 321, (carriage plate). Where a trench has been properly reinstated but has sunk, there is no liability, the defect being attributable to want of repair of the highway (*Hyams* v. *Webster* (1868), L. R. 4 Q. B. 138). See further, notes to s. 144 of the Public Health Act, 1875, *post*.

(*o*) *Cressy* v. *South Metropolitan Gas Co.* (1906), 70 J. P. 405.

(*p*) *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392.

(*q*) *Maxwell* v. *British Thomson Houston Co., Limited*; *Blackwell & Co.* (*third parties*) (1902), 18 T. L. R. 278.

For this purpose the sub-contractor used a tall derrick, which was a usual structure to employ in executing work of this kind, and his workman, on leaving off work, negligently left the derrick too close to the tramway, whereby the plaintiff, who was riding on a tramcar, was injured. It was held that as the work was being done on a highway, it was part of the contractor's duty to take reasonable precautions to protect the public, and that he could not escape from that duty by delegating the work to a sub-contractor. He was accordingly held liable in damages.

In *Harris* v. *Mobbs* (*r*) a house-van and plough had been unreasonably left by the defendant on the grassy side of a highway, so as to cause some danger to vehicles passing by A person drove his mare which, though he was unaware of her vice, was a kicker, in a cart along the road. In passing the van the mare shied at it, kicked, and galloped kicking for 140 yards, then got her leg over the shaft and fell, kicking her driver as he rolled out of the cart, from which hurt he died. In an action by his executors, it was contended that the *causa proxima* of the injury was the kicking of the mare, which was not a necessary or natural consequence either of the shying or running away. But DENMAN, J., thought that, as the plaintiff's testator had not been aware of the mare's vice (which might have rendered it negligent in him to drive the mare), and had not been guilty of contributory negligence, the unauthorised and dangerous appearance of the van and plough on the side of the highway was, within the meaning of the law, the approximate cause of the accident. "I think it cannot be laid down as having been the duty of the deceased to abstain from driving the mare. On the other hand, it cannot be laid down as the right of the defendant to assume that no nervous or runaway or kicking horse would come along the highway. It is only in the case of horses liable to be frightened that any danger exists, and where a horse has once been frightened by a dangerous apparition, unlawfully placed on the highway, running away and kicking can hardly be considered to be unusual or unnatural consequences of the fright."

In *Whyler* v. *Bingham Rural District Council* (*s*) a highway

(*r*) (1878), 3 Ex. D. 268. In *Macfarlane* v. *Colam*, [1908] S. C. 56, the driver of a motor car left his car unattended at the side of a highway, stopping the engine and leaving ample room for vehicles to pass. The horses in a passing wagonette shied at the motor car and got out of control, and damage was done to the wagonette and horses. The owner of the wagonette brought an action and recovered damages, but the Court of Session in Scotland held that the accident had not resulted from the car being left unattended, but through the shying of the horses and the inability of the driver to control them, and entered judgment for the defendant.

(*s*) [1901] 1 Q. B. 45. The plaintiff was proceeding at night on foot along a highway in Manchester not repairable by the defendants. The night was

authority in 1877 erected a fence at the side of a highway to protect passengers from a deep ditch, which, together with the road, was at times flooded. In 1900 the district council, as highway authority, removed the fence, which was then out of repair, intending to erect some posts in its place. Three weeks after the fence was removed and before the new posts were erected, the road became flooded, and the husband of the plaintiff drove into the ditch and was drowned. The plaintiff brought an action for damages for the loss of her husband, and the Court of Appeal held that there was evidence to be left to the jury upon which they were justified in finding that the act of the district council was an act of misfeasance, and that such act of misfeasance caused the death of the plaintiff's husband.

Mere delay, caused by an obstruction, is not particular and substantial damage so as to entitle a party to maintain an action. Thus, where the plaintiff, in an action for obstructing a public footway, proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with anyone else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction, it was held that he was not entitled to maintain the action. Even though the plaintiff had actually incurred expense in removing the obstruction, the court held that this sort of damage was not recoverable; otherwise, anyone who desired to raise the question of the legality of an obstruction would have only to go and remove it, and then bring his action for the expense of removing it (*t*). So, where the defendant had obstructed a public highway by laying on it several cart-loads of soil and rubbish, and

dark and there was no light in the street. When stepping off the pavement to cross the street, he fell or stumbled into a gully 18 inches to 2 feet deep and was injured. Other similar accidents had taken place earlier in the same month, and complaint of the unsafe condition of the gully had been made to the defendants. The gully had been excavated by water flowing from a tipping ground of the defendants, the effect of which, flowing with some force, had been to erode the ground. In 1877 the district was a ravine through which a brook flowed at the level of the street in question. The defendants purchased certain land to the north of the street to be used as a tipping ground, and diverted the brook into a culvert. The tipping, which had been going on since 1906, raised the land above its original level, and the water not percolating through the tip, and the tip not being properly drained, the water was discharged into the street in a greater volume than was originally the case. SANKEY, J. (at Manchester Assizes), held that, although the land might have been originally conveyed to the defendants for the purposes of a tip, they were not entitled to use it so as to cause a nuisance and that they were liable (*Priest* v. *Manchester Corporation* (1915), 13 L. G. R. 665; 79 J. P. Jo. 112). And see *McClelland* v. *Manchester* (*Lord Mayor of*), 28 T. L. R. 21; [1912] 1 K. B. 118; *McLoughlin* v. *Warrington Corporation* (1910), 75 J. P. 57. For a case of injury by ice on a foot-pavement see *O'Keefe* v. *Edinburgh Corporation*, [1911] S. C. 18.

(*t*) *Winterbottom* v. *Lord Derby* (1867), L. R. 2 Ex. 316.

the plaintiff, a coal and timber merchant, was thereby prevented "from enjoying his premises and carrying on his trade in so advantageous a manner as he had a right to do, and obliged to carry his coals, timber, etc. by a circuitous and inconvenient way," it was held by Lord KENYON, C.J., in the Court of King's Bench, that the action would not lie (*u*). But in one case it has been held that an action will lie where the defendant, who caused the obstruction, personally withstood and opposed the plaintiff, and prevented him from removing the obstruction (*x*).

In *Blagrave* v. *Bristol Waterworks Co.* (*y*) the declaration alleged that there was a public footway from one field of the plaintiff to another field of the plaintiff, and that the defendants obstructed the way, whereby the plaintiff and his servants employed in the management of his lands, and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done. This was held a sufficient allegation of peculiar damage to enable the plaintiff to maintain the action.

If the obstruction is the cause of direct loss or damage to the plaintiff, an action may be maintained.

When the plaintiff was navigating his barges laden with goods along a public navigable creek, and the defendant wrongfully moored a barge across, and kept the same so moored as to obstruct the navigation, whereby the plaintiff was obliged to unload his goods and convey them a great distance overland, and was thereby put to trouble and expense, this was held to be sufficient particular damage to support an action (*z*). Where the defendant shut, and kept shut, a gate across a public highway, and the plaintiff, a retail coal-higgler, proved that he was in the habit of passing up and down the road in question with coals, that on the day in question he had been delayed four hours, and prevented from performing the same journey as many times as he would otherwise have done, it was held that the plaintiff was entitled to recover (*a*).

Where the plaintiff was prevented by the defendant's obstruction from carrying his corn, whereby the corn was damaged by

(*u*) *Hubert* v. *Groves* (1794), 1 Esp, 148; *Dimes* v. *Petley* (1850), 15 Q. B. 276.

(*x*) *Chichester* v. *Lethbridge* (1738), Willes, 71.

(*y*) (1856), 1 H. & N. 369.

(*z*) *Rose* v. *Miles* (1815), 4 M. & S. 101.

(*a*) *Greasly* v. *Codling* (1824), 2 Bing, 263.

rain (*b*); and where the plaintiff, a farmer of tithes, was forced, by an obstruction of the highway, to carry them by a longer and more difficult way (*c*), an action was held to lie. In the latter case the court thought that "the labour and pains the plaintiff was forced to take with his cattle and servants by reason of this obstruction may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case."

Where the defendant obstructed a highway so that the plaintiff, the owner of a colliery, lost the profits thereof, all the judges agreed that an action on the case would lie (*d*). The result of this leading case is stated in Comyn's Digest as follows: "If A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to his colliery, an action on the case lies; for he ought to be remedied in particular, though it was a highway for all" (*e*).

In *Benjamin* v. *Storr* (*f*), the defendants, who carried on business as auctioneers in London, caused a public nuisance in a narrow street at the rear of their premises, by constantly loading and unloading goods into and from their vans. The plaintiff kept a coffee house in that street. The vans intercepted the light from the plaintiff's coffee shop to such an extent that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, and the stench arising from their frequent staleing there rendered the plaintiff's dwelling incommodious and uncomfortable; and the court held that this evidence disclosed such a direct and substantial private and particular damage to the plaintiff beyond that suffered by the rest of the public as to entitle him to maintain an action. There was evidence that in consequence of the nuisance the takings of the

(*b*) *Maynell* v. *Saltmarsh* (16 & 17 Car. 2), 1 Keble, 847.

(*c*) *Hart* v. *Basset* (33 Car. 2), T. Jones, 156.

(*d*) *Iveson* v. *Moore* (9 Will. 3), 1 Ld. Raym. 486. Lord HOLT, C.J., and ROKEBY, J., who dissented, did not impugn the general principle. They thought that the declaration did not sufficiently specify the particular damage, and that it should have been alleged that particular customers were coming and were hindered. In a note to Willes' Reports, p 74, the editor gives from a MS. note, in the collection of WILLES, C.J., the following short statement of the reasons for the final decision: "But the court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the judges, who all agreed in the opinion of TURTON, J., and GOULD, J., that the action lay. The reason the judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiff's wrong."

(*e*) Com. Dig. I. 278.

(*f*) (1874), L. R. 9 C. P. 400.

plaintiff's coffee house were materially lessened; and with regard to this, BRETT, J., observed: "If by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage" (*g*). In *Fritz* v. *Hobson* (*h*), where the defendant had been guilty of an unreasonable user of the highway, in the course of certain building operations, FRY, J., awarded damages for loss of custom to the plaintiff, a dealer in old curiosities; the natural effect of the defendant's conduct being to "drive away persons who might have become customers of the plaintiff, and to render the access to his house so difficult that most persons would abandon passing along that side of the road," and there being some evidence that persons who were in the frequent habit of going to the plaintiff's house as customers ceased to do so during the time the defendant's operations were going on (*i*). In *Martin* v. *London County Council* (*k*), a shopkeeper sued a local authority for damages caused by loss of business at his shop through the road which gave access to the shop being unnecessarily and negligently obstructed by them. Under an Act of Parliament the local authority were empowered to obstruct the road temporarily while making a new street. It was held by the Court of Appeal, that there being no evidence before the court of any damage

(*g*) *Ibid.*, at p. 407. See *ante*, p. 137, as to loading and unloading goods in front of business premises.

(*h*) (1880), 14 Ch. D. 542. See *ante*, p. 139.

(*i*) In the case of *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N. C. 281, the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by defendants continuing an authorised obstruction across it for an unreasonable time; the Court of Common Pleas held that this was a damage sufficiently of a private nature to form the subject of an action. This case was decided on the authority of *Iveson* v. *Moore*, *supra*; but after having been often cited as an authority, it was disapproved by the majority of the law lords in *Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175. In *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82, WILLES, J., expressed the opinion that, in consequence of that disapproval, *Wilkes* v. *Hungerford Market Co.* must now be regarded as overruled, and it has, accordingly, been usual so to treat it. See also KENNEDY, J., in *Martin* v. *London County Council* (1898), 14 T. L. R., p. 576. But it must be observed that the adverse comments of the majority of the judges in the Exchequer Chamber (5 B. & S. 156), on which the Lord Chancellor (CHELMSFORD) relied, are greatly discounted by their doubt whether an indictment could have been sustained in the circumstances of the case; and no satisfactory or substantial distinction has ever been drawn between the case of *Wilkes* v. *Hungerford Market Co.* and the cases of *Iveson* v. *Moore*; *Benjamin* v. *Storr*; and *Fritz* v. *Hobson*, *supra*. Sir F. POLLOCK points out that *Wilkes' Case* has been followed by the Supreme Court of Massachusetts (*Stetson* v. *Faxon* (1837), 19 Pick. 147; Pollock on Torts, 11th ed., p. 408 n. (*i*)).

(*k*) (1899), 80 L. T. 866; affirming KENNEDY, J., 79 L. T. 170.

to the plaintiff arising out of any excess by the local authority of their statutory powers, the local authority were entitled to judgment. But where a borough council unlawfully erected a stand for the accommodation of the members of the council and their friends in order to view the funeral procession of King Edward the Seventh in front of the plaintiff's house, thereby causing her special damage by obstructing the view from her house, she was held entitled to recover damages (*kk*).

Where a person allows his cattle to stray on a highway, it is an offence such as the highway surveyor may take notice of, and if they do damage he may be liable. There must be shown to be a legal duty and a breach of that duty. To allow a horse to stray upon a highway is a trespass against the owner of the soil, and if the horse kicks a person passing along the highway, the owner is not liable unless he knew the horse was vicious (*l*). So where fowls stray upon a highway and upon their being frightened one of them flies into the spokes of a bicycle, whereby the cyclist is knocked off and injured, he cannot recover damages against the owner of the fowls (*m*). And where a sow strayed upon a highway and, being startled by a passing motor, jumped up and frightened the plaintiff's horse and caused it to shy, and an accident happened, the owner of the sow was not liable (*n*). And where sheep escaped on to the highway from the defendant's field through gaps in a defective hedge and one of them ran into the plaintiff's motor car and caused it to be overturned and damaged, the defendant was held not liable in damages (*nn*). In such cases for the plaintiff to succeed, he must show negligence, not merely trespass. There is no duty on the driver of a flock of sheep driven along the highway at night to carry a light, and the failure to do so is no evidence of negligence (*o*).

(*kk*) *Campbell* v. *Paddington Borough Council* (1911), 27 T. L. R. 232.

(*l*) *Cox* v. *Burbidge* (1863), 13 C. B. (N.S.) 430. *Ellis* v. *Banyard* (1911), 28 T. L. R. 122. And see *Jones* v. *Lee* (1911), 28 T. L. R. 92; 106 L. T. 123 (horse straying on highway); *Pinn* v. *Rew* (1916), 32 T. L. R. 451 (cow and calf on highway); *Turner* v. *Coates*, [1917] 1 K. B. 670 (unbroken colt loose on highway at night). See further *Lowery* v. *Walker* (1910), 27 T. L. R. 83; [1911] A. C. 10.

(*m*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345.

(*n*) *Higgins* v. *Searle* (1909), 73 J. P. 185. Where a blind dog ran into, or was run into by a bicycle, and the cyclist was injured, it was held that the owner of the dog was not guilty of negligence in allowing the dog on the highway (*Millns* v. *Garratt*, Times, March 6th, 1906).

(*nn*) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K. B. 370.

(*o*) *Catchpole* v. *Minster* (1914), 109 L. T. 953. But while the owner is not liable for the consequences of a harmless animal straying on the highway, he may be liable for an injury caused by a mass of animals forming an obstruction and causing damage (*Cunningham* v. *Whelan* (1917), 52 I. L. T. 67, per MOLONY, L.J.).

Injury to Private Right of Access to the Highway.—The owner of land adjoining a highway has a right of access to the highway from any part of his land adjoining the way. This is a private right, distinct from the right to use the highway as one of the public, and the owner of the land whose access to the highway is obstructed may maintain an action for the injury, whether the obstruction does or does not also constitute a public nuisance (*oo*). "It would be the height of absurdity to say that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with" (*p*).

Where a plaintiff occupied a cottage and a small piece of land on a level with and abutting on a public highway, to which he had access from his cottage by a short way over his own land, and a railway company, under statutory powers, lowered the highway seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step ladder in order to obtain access from the highway to the passage leading over his land to his cottage, it was held that this was an injury of a permanent nature to the plaintiff's land for which compensation must be made under the Railways Clauses Consolidation Acts (*q*).

Where the plaintiff alleged that the defendants, a railway company, had injuriously affected certain houses, of which he was lessee, being four houses on the highway, and eight other houses which were in the course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway; the arbitrator's award found that by reason of the obstruction of the highway, by the construction of the railway

(*oo*) *Rose* v. *Groves* (1843), 5 M. & G. 613; *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *Bell* v. *Quebec Corporation* (1879), 5 App. Cas. 84; *Rowley* v. *Tottenham U. D. C.*, [1914] A. C. 95, affirming, [1912] 2 Ch. 633.

(*p*) PAGE WOOD, V.-C.: *Att.-Gen.* v. *Conservators of the River Thames* (1862), 1 H. & M. 1.

(*q*) *Moore* v. *Great Southern and Western Rail. Co.* (1858), 10 Ir. C. L. Rep. 46. The court, accordingly, held that an action would not lie, the injury being the subject of compensation under the statutes. *Cf. R.* v. *Eastern Counties Rail. Co.* (1841), 2 Q. B. 347. The principles under which compensation is given under the Railways Clauses Consolidation Act and similar Acts are very fully examined in *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259. Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed (Lord CAMPBELL, C.J.: *Re Penny* v. *South Eastern Rail. Co.* (1857), 7 E. & B. 660). But there are several cases where an action would have lain, in which compensation is not given. See *Caledonian Rail. Co.* v. *Walker's Trustees, supra.*

across the same, the access to the houses of the plaintiff was, notwithstanding the substitution of a deviation road and bridge across the railway, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had been greatly diminished: the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, held that this finding showed a particular damnification to the plaintiff, and that he was entitled to compensation (*r*).

Where the plaintiff was possessed of a house fronting on a public highway, and the defendant company, under their statutory powers, erected an embankment on a portion of the highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, and thus, according to the evidence, materially diminishing the value of the house for selling or letting, and obstructing the access of light and air to it, it was held that this was a permanent injury to his land, entitling him to compensation (*s*). It was held to be a question for the jury whether there was any diminution in the value of the house by reason of the contraction of the road in front of it

In *Cobb* v. *Saxby* (*ss*) the side wall of the defendant's house projected into the street a short distance beyond the front of the plaintiff's house adjoining, and the plaintiff by fixing boards at right angles to the front of his own house, close to the defendant's side wall, and covering it to a height of 22 feet from the pavement, deprived the defendant of access to the wall from the street for the purpose of repairing it and exhibiting advertisements upon it. The defendant thereupon (by way of counterclaim) successfully claimed an injunction restraining the plaintiff from keeping the boards in that position (*ss*).

Where the respondents were possessed of a spinning mill, ninety yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare, and a railway company, under statutory powers, cut off entirely one access, substituting therefor a deviated road over a bridge, with steep gradients, and diverted the other access and made it less convenient, it was held that the respondents were entitled to compensation for the diminished value of their premises by reason of the detour and gradients (*t*). Where a highway has

(*r*) *Chamberlain* v. *Crystal Palace Rail. Co.* (1862), 2 B. & S. 695.

(*s*) *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82.

(*ss*) [1914] 3 K. B. 822.

(*t*) *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259. See also *Wadham* v. *North Eastern Rail. Co.* (1885), 16 Q. B. D. 227; *Metropolitan Board of Works* v. *Howard* (1889), 5 T. L. R. 732; *Fisher* v. *Great Western Rail. Co.*, [1910] 2 K. B. 252. But if no compensation is provided by statute the person injured is without remedy. "If persons . . . acting in the

subsided, being damaged through mining operations, the highway authority are entitled to recover the cost of restoring and repairing the road from the wrongdoer (*u*). They are not entitled to raise the highway to the old level, cost what it might, and whether it would be more commodious to the public or not, if an equally commodious highway might have been made at less cost, but are only entitled to recover what it would have cost to make the highway equally commodious (*x*). They may raise the level, although the level to which it is raised will obstruct the access of the adjoining owner (*y*). Where there is a statutory obligation to construct a bridge over a navigable canal at a certain height above the canal, the canal company are entitled to have the bridge maintained at that height notwithstanding subsidences owing to mining operations (*z*); and if the bridge is a county bridge, the county must bear the expense of raising it and the approaches (*a*). Where, therefore, owing to mining operations, a bridge and canal in a county borough had subsided, and the canal company, acting reasonably for the protection of the canal, raised the banks, with the result that the level of the water came so near to the under-surface of the bridge that the latter became an obstruction to the navigation, and the bridge was dangerous to traffic passing over it, it was held that the county borough must bear the expense of rebuilding and raising the bridge so as to make the canal navigable (*a*).

In *Fritz* v. *Hobson* (*b*), where the unreasonable user of the highway by the defendant had rendered the access to the plaintiff's shop so difficult that the natural effect was to drive away persons who might have become customers of the plaintiff, and to oblige most persons to abandon passing along that side of the road, FRY, J., held that the plaintiff's private right of access to the highway had been unlawfully interfered with, and that he was entitled to recover damages from the defendant to the extent of his loss of profits.

execution of a public trust and for the public benefit, do an act which they are authorised by law to do and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy, unless a remedy is provided by the statute" (*East Freemantle Corporation* v. *Annois*, [1902] A. C., p. 217).

(*u*) *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54.

(*x*) *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A. C. 323.

(*y*) *Atherton* v. *Cheshire County Council* (1896), 60 J. P. 6.

(*z*) *Rhymney Rail. Co. and Great Western Rail. Co.* v. *Glamorganshire Canal Navigation* (1904), 91 L. T. 113.

(*a*) *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477.

(*b*) (1880), 14 Ch. D. 542. See *ante*, p. 139. The learned judge also thought the plaintiff was entitled to succeed on the ground that he had sustained particular damage from a public nuisance. See *ante*, p. 148.

The right of access to the highway extends along the whole line of the boundary between the highway and the adjoining land. The owner of the adjoining land may prevent the erection of any building or other obstruction which bar his access to the highway. Thus, where the plaintiff's land came down to the very edge of a public promenade, and the local board erected a fence whereby he was deprived of direct access to the esplanade, ROMER, J., decided that the plaintiff was entitled to a mandatory injunction to compel the defendants to remove the fence, and to an inquiry as to the amount of special damage he had sustained (*c*). But the premises must actually adjoin the highway; and, if there is an intervening wall or strip of land, however narrow, belonging to another person, the owner of the premises had neither the rights nor the liabilities of a frontager (*d*). Cases have occurred in urban districts where an adjoining owner has imperilled his right of access to a highway by acquiescing in the erection of a large advertisement board on the side of his building; a legal easement may thus be acquired (*e*) whereby the owner may be effectually prevented from altering the entrance to his premises.

The right of access to the highway must be distinguished from the right to transfer goods from vans in the highway across the pavement to the private premises. The former right is a private right, and any interference with it is an interference with a private right; but the latter right is a right enjoyed by the owner as one of the public entitled to use the highway. Where, therefore, a local authority in the metropolis, acting bonâ fide under the Metropolis Management Act, 1855 (*f*), s. 130, erected a lamp post on the pavement near the kerb, in such a position to the plaintiff's premises as to obstruct or prevent him from loading and unloading goods to be taken into his premises, it was held that he had no legal ground of complaint (*g*). And so where a corporation authorised by a local Act to erect in the streets such works as might be necessary for their tramways, proceeded in good faith to erect a pole and fuse-box in the pavement close to the principal entrance of the plaintiff's premises, to which the plaintiff objected and claimed an injunction, it was held that he was not entitled to an injunction (*h*).

(*c*) *Ramuz* v. *Southend Local Board* (1892), 67 L. T. 169; 8 T. L. R. 700.

(*d*) *Cf. Lightbound* v. *Higher Bebington Local Board* (1885), 16 Q. B. D. 577.

(*e*) *Moody* v. *Steggles* (1879), 12 Ch. D. 261.

(*f*) 18 & 19 Vict. c. 120.

(*g*) *W. H. Chaplin & Co., Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329.

(*h*) *Goldberg & Sons, Limited* v. *Liverpool Corporation* (1900), 82 L. T. 362.

Remedies for Nuisance.—The ordinary public remedy for nuisance is by indictment in the name of the Crown; and if the nuisance is continued, by further indictment; for every continuance of a public nuisance is a nuisance. The court may also give judgment that the nuisance be abated (*i*); but this will not be done when the court is satisfied by evidence that the obstruction, the subject of the indictment, has already been removed (*k*).

An appeal lies from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes (*l*). In the case of an acquittal for non-repair, no appeal lies, and no new trial will be granted (*m*), but under very special circumstances the court will suspend the entry of the judgment, so as to enable the parties to have the question reconsidered upon another indictment without the prejudice of the former judgment (*n*). In the case of an acquittal for obstruction, the court will not do this, as the rights of the parties are not finally determined, and a fresh indictment can immediately be presented in respect of the obstruction, to which the former acquittal cannot be pleaded in bar (*nn*).

The Attorney-General (*o*) can maintain an action on behalf of the public to restrain the commission of an illegal act, or to compel the removal of an obstruction (*oo*), which in its nature tends to the injury of the public (such as an interference with a public highway, or

(*i*) *Rex* v. *Pappineau* (12 Geo. I), Stra. 686; *Rex* v. *Stead* (1799), 8 T. R. 142. A writ "de nocumento amovendo" may issue to the sheriff. For form see Short and Mellor's Crown Practice, 2nd ed., p. 560.

(*k*) *Rex* v. *Incledon* (1810), 13 East, 164.

(*l*) The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (3), *post*.

(*m*) *Rex* v. *Burbon* (*Inhabitants*) (1816), 5 M. & S. 392.

(*n*) *Rex* v. *Wandsworth* (*Inhabitants*) (1817), 1 B. & Ald. 63; *R.* v. *Sutton* (1833), 5 B. & Ald. 52; *R.* v. *Southampton* (*Inhabitants*) (1887), 19 Q. B. D., p. 597.

(*nn*) *Rex* v. *North Eastern Rail. Co.* (1901), 70 L. J. K. B. 548; *R.* v. *Russell* (1854), 3 E. & B. 942; *R.* v. *Johnson* (1860), 2 E. & E. 613; *R.* v. *Leigh* (1840), 10 A. & E. 398; *R.* v. *Duncan* (1881), 7 Q. B. D. 198.

(*o*) A local authority not having suffered particular damage are not entitled by the Public Health Act, 1875, s. 107, to sue in respect of a public nuisance. The proper plaintiff is the Attorney-General, or a person suffering particular damage. *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; approved *Tottenham Urban District Council* v. *Williamson and Sons, Ltd.*, [1896] 2 Q. B. 353. The Attorney-General has the right to call the attention of the court to a breach of duty in disobeying byelaws without any actual injury to any public interest being shown, but the court will not generally interfere by injunction unless a public injury be done. (*Att.-Gen.* (*Wirral Rural District Council*) v. *Kerr and Ball* (1914), 79 J. P. 51,—a case of bungalows built on low-lying ground and alleged to be insanitary, a danger to public health, and in contravention of byelaws.)

(*oo*) *Att.-Gen.* v *Bowen* (1914), 78 J. P. (Jo.) 220.

a navigable stream), without adducing any evidence of actual injury to the public; and in such a case an injunction will be granted with costs, although no evidence of actual injury is given (*p*).

A person who has sustained particular damage (*q*) by reason of a nuisance may maintain an action for damages. He may also obtain an injunction to restrain the continuance of the nuisance; but if he has for a long time acquiesced in the existence of the nuisance, the court may refuse an injunction, leaving him to his remedy by action for damages (*r*). Where a public street was improperly used as a stable-yard, it was held that the nuisance was not of so permanent a nature as to entitle a reversioner to an injunction. JESSEL, M.R., observed that if the tenants of the houses were now complaining there could be no answer to the case, but that to entitle a reversioner to maintain an action the injury must be necessarily of a permanent character, and that a presumed intention to continue the nuisance was not sufficient, even where there was evidence that the premises would sell for less if the nuisance was continued (*s*).

Anyone who is actually obstructed in the exercise of his right of passing along a highway has, by the common law, a right to abate the obstruction by removing it in order to pass (*t*). But this is only justifiable where necessary to the exercise of one's right. If it is possible to avoid the nuisance by taking any other course with reasonable convenience, *e.g.*, if there is sufficient room for him to pass, he cannot justify abating the obstruction (*u*). "If there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and without considering whether he must show that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway,

(*p*) *Att.-Gen.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch. D. 752; *Att.-Gen.* v. *Barker* (1900), 83 L. T. 245; KAY, L.J., in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. at p. 270; *Att.-Gen* v. *Tod-Heatley*, [1897] 1 Ch. 560; *Att.-Gen.* v. *Grays Chalk Quarries Co., Ltd.* (1910), 74 J. P. (Jo.) 147; *Att.-Gen.* v. *Roe*, [1915] 1 Ch. 235.

(*q*) *Ante*, pp. 139 *et seq.*

(*r*) *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484. *Att.-Gen. and Godstone Rural District Council* v. *Warren Smith* (1912), 76 J. P. 253, following *Att.-Gen.* v. *Grand Junction Canal* (1909), 73 J. P. 421; [1909] 2 Ch. 518.

(*s*) *Mott* v. *Shoolbred* (1875), L. R. 20 Eq. 22.

(*t*) *Chichester* v. *Lethbridge* (1738), Willes, 71.

(*u*) *Dimes* v. *Petley* (1850), 15 Q. B 276.

if avoiding it he might have passed on with reasonable convenience" (*x*).

"It is very important, for the sake of the public peace and to prevent oppression, even on wrongdoers, not to confound common with private nuisances in this respect. In the case of the latter, the individual aggrieved may abate (3 Bla. Com. 5), so as he commits no riot in doing it; and a public nuisance becomes a private one to him who is especially, and in some particular way, inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down; but the ordinary remedy for a public nuisance is itself public, that of indictment; and each individual who is only injured as one of the public, can no more proceed to abate than he can bring an action" (*y*).

Where a public footbridge over a stream became ruinous, and the defendants who were under no legal liability erected a new bridge on the site of the old one, it was held that the owner of the soil was entitled to have so much of the new bridge as rested on his soil removed (*z*). The default of the highway authority to repair does not extend the burden placed on a person's land, and give to other persons a right to go on that land, which could not have existed if the local authority had not been guilty of default. "There is a broad difference between removing an obstruction which has been wrongfully placed in the highway, and making good by a permanent structure, the result of mere non-feasance on the part of those charged with the duty of repairing; therefore, a person who is merely entitled as one of the public to use a bridge carrying the highway over a river, is not justified in entering on another person's land and re-erecting the bridge which has been allowed to fall into decay. An operation of this kind cannot properly fall under the term 'abatement,' even if the right to 'abate' can be said to exist at all in the case of a nuisance arising from mere non-feasance" (*a*).

In *Bagshaw* v. *Buxton Local Board* (*b*), JESSEL, M.R., expressed the opinion that where it had been judicially decided that an obstruction to a highway exists, a surveyor of highways, as representing the public, was entitled to prostrate the obstruction on reasonable notice (*c*).

(*x*) *Ibid., per cur.*; *cf. Bateman* v. *Bluck* (1852), 18 Q. B. 870.

(*y*) *Colchester (Mayor of)* v. *Brooke* (1845), 7 Q. B., p. 377 (*per cur.*).

(*z*) *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518.

(*a*) *Ibid.*, p. 523 (COLLINS, L.J.).

(*b*) (1875), 1 Ch. D. 220.

(*c*) It would appear from *Lemmon* v. *Webb*, [1895] A. C. 1, that notice is not even necessary, although it may be prudent always to give notice. See also *Reynolds* v. *Urban District Council of Presteign*, [1896] 1 Q. B. 604. If

Summary remedies for the prevention and removal of encroachments and obstructions are provided by the Highway Acts (*d*).

At common law no lapse of time will justify a nuisance (*e*). Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it (*f*). The consent of a highway authority to an obstruction or encroachment upon the highway is ineffectual for the purpose of legalising that obstruction or encroachment (*g*).

Where the owner of land adjoining a highway wrongfully obstructs the highway, he cannot recover damages for trespass if the public deviates on to his land in order to get by the obstruction (*h*).

the highway authority proceeds to prostrate the obstruction without taking proceedings before justices, they may, if they have acted unlawfully, be held liable in damages for trespass; but if they take proceedings and obtain a decision of justices in their favour, they have an answer to such an action. *Cf. Keune* v. *Reynolds* (1853), 2 E. & B. 748. See notes to s. 69 of the Highway Act, 1835, *post*.

(*d*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 69, 72, 73; the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51.

(*e*) In *R.* v. *Edwards* (1847), 11 J. P. 602, tried before WILLIAMS, J., and a jury, the defendant was found guilty of an encroachment which had existed for forty years. *Cf. Weld* v. *Hornby* (1806), 7 East, 195; *Vooght* v. *Winch* (1819), 2 B. & Ald. 663.

(*f*) *R.* v. *Inhabitants of St. James, Taunton*, Selwyn's Nisi Prius, 12th ed., 1315; *Harvey* v. *Truro Rural District Council*, [1903] 2 Ch. 638.

(*g*) *Harvey* v. *Truro Rural District Council*, *supra*.

(*h*) *Stacey* v. *Sherrin* (1913), 29 T. L. R. 655.